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In the Supreme Court of the United States

OCTOBER TERM, 1979

BYRON H. NAISBITT, EXECUTOR OF THE ESTATE OF CAROL NAISBITT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the government may be held liable on a negligence theory under the Federal Tort Claims Act for failing to prevent an off-duty employee from committing an assault and battery.

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The opinion of the court of appeals (Pet. App. A-1 to A-14) is reported at 611 F. 2d 1350. The opinion of the district court (Pet. App. A-15 to A-19) is reported at 469 F. Supp. 421.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1980. The petition for a writ of certiorari was filed on March 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of crimes committed by Dale S. Pierre and William Andrews, two off-duty airmen stationed at the Hill Air Force Base near Ogden, Utah. On April 22, 1974, Pierre and Andrews entered a privately owned retail store in Ogden and committed a variety of offenses, resulting in the death of three persons and serious injury to two others (Pet. App. A-2).

Petitioners, the victims who survived the attacks and the personal representatives of those who did not, filed the instant Federal Tort Claims Act suit against the United States in the United States District Court for the District of Utah. Petitioners alleged that the commanding officers at Hill Air Force Base knew that Pierre and Andrews were violent and capable of committing such crimes and that the officers were negligent in failing to have the men committed to a hospital for observation and treatment or to confine them to the base. Such negligence, petitioners argued, gives rise to liability under 28 U.S.C. 1346 and 2671 *et seq.* (Pet. App. A-2).

The district court granted the government's motion to dismiss the complaint on the ground that the claim is barred by 28 U.S.C. 2680(h), which provides that the

waiver of sovereign immunity in the Federal Tort Claims Act does not apply to any claim arising out of certain intentional torts, including assault or battery (Pet. App. A-15 to A-19).[1] The court of appeals affirmed, agreeing with the district court that an assault or battery committed by an off-duty government employee is an intentional tort for which government liability is barred by Section 2680(h).[2]

ARGUMENT

The holding of the court of appeals that the government is not liable under the Federal Tort Claims Act on the facts alleged in this case is plainly correct and,

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[1]As originally enacted, 28 U.S.C. (1952 ed.) 2680 provided that the Federal Tort Claims Act "shall not apply to—* * * (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights * * *."

This subsection was amended on March 16, 1974 (Pub. L. No. 93-253, Section 2, 88 Stat. 50), to permit claims against the United States arising out of assault, battery, and other intentional torts with regard to acts or omissions of federal investigative or law enforcement officers. This exception to the bar to liability is obviously inapplicable in the present case.

[2]The government also argued in its motion to dismiss the complaint in the district court that (1) the claims for liability arising from the failure of Air Force personnel to commit or confine Andrews and Pierre were based on the exercise or failure to exercise a discretionary function and were, therefore, barred by 28 U.S.C. 2680(a) (Memorandum in Support of Defendant's Motion to Dismiss at 7-9) and (2) the claims were barred by 28 U.S.C. 2674 because a "private individual under like circumstances" would not be liable under Utah law for the failure to restrain his employees (Memorandum, at 5-7). Because it found petitioners' claims to be barred by 28 U.S.C. 2680(h), the district court did not rule on these contentions (see Pet. App. A-16). Nevertheless, in the court of appeals, both petitioners and the government addressed the question whether a private individual under like circumstances would be liable in negligence under Utah law. See pages 3-4, *infra*. The court of appeals did not directly address this issue.

contrary to petitioners' assertions (Pet. 7-14), does not conflict with the decisions of this Court or of any other court of appeals. Accordingly, further review is unwarranted.

1. It is undisputed that the attacks by Pierre and Andrews were not ordered by any agent of the federal government and occurred off government premises and outside of normal working hours. Thus, petitioners' claims, if based on the attacks themselves, would clearly be barred by 28 U.S.C. 1346(b). That section confers jurisdiction on the district courts of claims against the United States only if based on the negligent or wrongful act or omission of a government employee "while acting within the scope of his office or employment"—a phrase that, in the case of military personnel, "means acting in line of duty." 28 U.S.C. 2671.

Petitioners seek to avoid this result by bringing a claim sounding in negligence, alleging that personnel at Hill Air Force Base should have prevented Pierre and Andrews from committing these acts in their off-duty hours and off government premises by confining them to the base or committing them to a hospital for evaluation and treatment. Under established principles of tort law, however, a private employer is not liable for the conduct of his employees off the employer's premises and in nonduty hours. See *Restatement (Second) of Torts* § 317 (1965). Indeed, petitioners expressly conceded in the court of appeals that Utah law[3] "does not impose a duty upon

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[3]28 U.S.C. 2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *.

Under 28 U.S.C. 1346(b), liability of the United States is to be determined "in accordance with the law of the place where the act or omission occurred."

[an] employer to control his employees while acting outside the scope of their employment" (Reply Br. 15).[4] This principle has particular force with respect to the federal government, which cannot reasonably be expected to account in money damages for the off-duty conduct of its several million civilian and military employees throughout the country. And this principle, we submit, is a complete answer to petitioners' argument for liability here.

2. Petitioners nevertheless contend that the United States may be sued for its failure to prevent Pierre and Andrews from committing the assaults and batteries involved in this case after their commanding officers allegedly knew of their dangerous propensities (Pet. 15-16, 17-18). This contention is difficult to square with petitioners' concession that, under Utah law, an employer has no duty to control the off-duty conduct of his employees. Petitioners also do not explain how their theory of recovery for injuries sustained as a result of the assaults and batteries can be reconciled with the language of 28 U.S.C. 2680(h), which bars any claim *arising out of* assault or battery, except those committed by federal law enforcement officers. Congress could have drafted a narrower exception, barring only claims *for* assault or battery—*i.e.*, claims sounding in intentional tort. See *Collins* v. *United States*, 259 F. Supp. 363 (E.D. Pa. 1966).[5] But Congress drafted the exception more broadly.

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[4]Petitioners also agreed (Reply Br. 15) with the government's position that applicable state law principles of *respondeat superior* are not expanded merely because the government is an employer in its military rather than civilian capacity. See Appellee Br. 9-11; *Williams* v. *United States*, 350 U.S. 857 (1955).

[5]In *Collins*, the complaint alleged that a postal employee, acting within the scope of his employment, struck the plaintiff and that the United States was negligent in hiring and retaining the employee when it knew or should have known he had "violent, vicious and

Here, petitioners' claims plainly "arise out of" an assault and battery, and 28 U.S.C. 2680(h) contains no exception for situations involving alleged antecedent negligence by other governmental personnel who might have prevented the assault or battery from occurring.[6]

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malicious propensities" (259 F. Supp. at 364). The court dismissed the complaint because the claim was one "arising out of" assault and battery within the meaning of 28 U.S.C. 2680(h).

[6]The reasons for barring all claims arising out of intentional torts are not difficult to identify. Mr. Justice Harlan, then writing for the United States Court of Appeals for the Second Circuit, mentioned several considerations underlying the bar to liability in 28 U.S.C. 2680(h) for assault, battery, and other intentional torts committed by government employees:

> [I]t may be that the § 2680(h) exceptions were prompted by the thought that high standards of public service would be promoted by government employees knowing that they could not engage in such lawless activities at government expense. Or it might be that these exceptions were considered as involving activities which practically, even though not legally, speaking are outside the scope of a government employee's proper official functions, or in any event unusually difficult for the Government to defend against.

Panella v. *United States*, 216 F. 2d 622, 625 (2d Cir. 1954). Moreover, as the court of appeals recognized (Pet. App. A-14), Congress reasonably could have concluded that an intentional tort such as assault or battery is of a sufficiently aggravated nature that, as a matter of federal law under the Tort Claims Act, it should be regarded as an intervening cause of any ensuing injury that relieves the government of liability on a theory that its negligence may also have contributed to the injury in some fashion. These considerations apply with all the more force where, as here, an assault or battery is committed by a government employee in his off-duty hours and off government premises.

Congress' decision in 1974 to permit claims arising out of assault or battery committed by federal investigative and law enforcement personnel (see note 1, *supra*) does not undercut the force of these policy considerations in other cases, such as that presented here. The work of law enforcement and investigative personnel is such that assault and battery will occasionally (albeit regrettably) occur in the

Moreover, petitioners' contention that the government may be sued on a negligence theory under the Federal Tort Claims Act for failing to prevent its employees from committing intentional torts has been uniformly rejected by the courts. In *United States* v. *Shively*, 345 F. 2d 294 (5th Cir. 1965), for example, suit was filed against the United States by a woman who was shot by her husband, an Army sergeant. Prior to the incident, plaintiff informed the commanding officer at Fort Benning that her husband had beaten her and threatened to kill her on more than one occasion. Shortly after this conversation, the husband obtained a gun from the arms room at Fort Benning (in violation of Army regulations), shot his wife, and killed himself. The Fifth Circuit held that the suit was a " 'claim arising out of assault', which is, in those words, specifically excepted from recovery under the Federal Tort Claims Act, 28 U.S.C. § 2680(h)" (345 F. 2d at 297).[7] Similarly, in *Pennington* v. *United States*, 406 F. Supp. 850 (E.D.N.Y. 1976), the court dismissed a Tort Claims Act suit, despite allegations that the government had prior knowledge that the assailant, an off-duty United States marshal, had violent tendencies and that the government was negligent in hiring and failing to supervise him properly. Accord, *Davidson* v. *Kane*, 337 F. Supp. 922

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execution of their official duties, whatever the precautions taken, and Congress has simply chosen to make the government liable when such episodes occur. This does not suggest that Congress would have intended to render the United States liable for intentional torts, such as those committed by Pierre and Andrews, that have no relation to the official duties of its employees.

[7]The court also ruled that the Army's negligence was not the proximate cause of plaintiff's injury (345 F. 2d at 296-297).

(E.D. Va. 1972); *Collins* v. *United States*, *supra*. See also *Restatement (Second) of Torts* § 314 (1965).[8]

3. There is a line of cases, distinct from the present case, in which the government has been held liable because of negligent operation of institutions, like mental hospitals or jails, which are expressly charged with the responsibility of supervising persons who pose a danger to society. When the negligent operation of such a facility by a private party leads to the injury of a third person, liability of the operator of the facility is well established in tort law. See *Restatement (Second) of Torts* § 319 (1965).[9] Although the government has no legally enforceable duty to the public to commit an individual to such an institution, if it chooses to do so and thereby voluntarily assumes the duty to protect the public from the individual, the government, like a private person, may be held liable for the negligent performance of that duty. Cf. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955); *Rogers* v. *United States*, 397 F. 2d 12, 14 (4th Cir. 1968).

Thus, the government has been held subject to suit where an inmate of a federal prison was assaulted by fellow prisoners as a result of the lax supervision of the guards. See *Muniz* v. *United States*, 305 F. 2d 285 (2d Cir. 1962) (en banc), aff'd, 374 U.S. 150 (1963); *Panella* v.

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[8]Section 314 provides:

> The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

[9]Section 319 provides:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

United States, supra. In *Gibson* v. *United States*, 457 F. 2d 1391 (3d Cir. 1972), upon which petitioners rely (Pet. 7-9), the court applied this same principle with respect to injuries resulting from an attack by an enrollee of a federal Job Corps Center on an instructor at the Center.[10] The government has also been subjected to liability for injuries caused by dangerous persons whom it had negligently released from psychiatric institutions. See *Hicks* v. *United States*, 511 F. 2d 407 (D.C. Cir. 1975); *Underwood* v. *United States*, 356 F. 2d 92, 95, 98 (5th Cir. 1966); *Fair* v. *United States*, 234 F. 2d 288, 290 (5th Cir. 1956).

Because of the unique, affirmative responsibility the government has been held to have assumed for the safety of others in those situations, the decisions just cited have, in effect, fashioned an implied exception to the bar in 28 U.S.C. 2680(h) to claims arising out of assault or battery. There is no occasion here to consider the scope of this implied exception, support for which can, at all events, be found in the obligation owed to the public under tort law

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[10]In *Gibson*, the court, relying on Section 319 of the Restatement (457 F. 2d at 1395; see note 9, *supra*), held that the government could be found liable for negligent supervision at the Job Corps Center which led to the attack on the Job Corps instructor. The enrollees at the center were "dangerous, mentally ill young men who were known to be violent juvenile offenders and drug addicts" (457 F. 2d at 1394). The court, while acknowledging that a person ordinarily owes no duty of protection to others (*ibid.*), held that the government had "accepted the duty of caring for and controlling [the enrollees] knowing of their drug addiction and instability" and was, under these circumstances, "obliged to exercise reasonable care to prevent them from harming others" (*id.* at 1396).

In its subsequent opinion on appeal following remand, the Third Circuit affirmed the district court's ruling that the federal government did not have control over the day-to-day operations of the center and that, under this Court's decision in *United States* v. *Orleans*, 425 U.S. 807 (1976), the government therefore could not be held liable to the plaintiff for failing to provide adequate supervision. *Gibson* v. *United States*, 567 F. 2d 1237 (3d Cir. 1977).

generally by one who has "take[n] charge" of a person he knows or has reason to know is likely to cause bodily harm. *Restatement (Second) of Torts* § 319 (1965). In the present case, petitioners did not allege that the government had "take[n] charge" of Pierre and Andrews by committing them to an institution for psychiatric care or otherwise assuming an affirmative duty to control their conduct in significant respects for the protection of the public. As noted above, absent such allegations, courts have consistently held that the government is not liable in tort for assaults or batteries committed by the individual. See also *Sanchez* v. *United States*, 506 F. 2d 702 (10th Cir. 1974).[11]

Petitioners attempt to bring their claims within the reach of Section 319 of the *Restatement* (see note 9, *supra*) and the implied exception to the bar to liability under 28 U.S.C. 2680(h) by asserting (Pet. 15) that the government had the "duty and opportunity to control" Pierre and Andrews. Even assuming that the government had the authority and opportunity somehow to restrain or confine Pierre and Andrews, however, petitioners wholly fail to identify the source of a legally enforceable duty on the part of the government to do so. The only relationship of the government to the airmen in this case was that of an employer to his employees, which (as petitioners conceded below) gives rise to no duty on the employer's part to control off-duty conduct.[12]

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[11]In *Sanchez*, upon which petitioners also rely (Pet. 12-13, 16), the Tenth Circuit ruled that, for the government to be responsible for an assault and battery committed by a student attending a school operated by the Bureau of Indian Affairs, "it would have to appear that the school was similar to a jail or asylum." 506 F. 2d at 704.

[12]Because of petitioners' concession on this point, there is no need for the Court to consider whether the government could be sued for negligence under the Tort Claims Act on facts such as those presented

The mere ability of the government to direct its millions of military and civilian personnel in the performance of their official duties does not imply a right, much less a legal duty, pervasively to control their conduct off government premises and outside working hours. Such limited, job-related supervisory responsibility is vastly different from the sort of custody and control over all aspects of an institutionalized person's conduct that the government has been held to have assumed for the protection of others in the cases upon which petitioners rely.

Although the requirements of the military provide the opportunity for commanding officers to direct the conduct of personnel to a greater degree than is typically found in the civilian setting, this greater authority to control is conferred for reasons pertaining to the needs of the military, not, as in the cases upon which petitioners rely, for the protection of the public. No duty to protect the public may therefore be inferred from the existence of military command. In any event, as mentioned above (see note 4, *supra*), petitioners have correctly conceded that the fact that the government is an employer in its military capacity does not expand applicable principles of *respondeat superior*.[13]

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here if applicable state law did impose a duty on an employer to control the off-duty conduct of his employees. As we have pointed out, however, 28 U.S.C. 2680(h) states a flat prohibition against suits "arising out of" assault or battery. The scope of any implied exception to this bar, such as for situations involving institutionalized control of the assailant for the protection of society, would appear to be a question of federal law involving an interpretation of the Tort Claims Act itself, not a matter of state tort law. Cf. *United States* v. *Muniz*, 374 U.S. 150, 164-165 (1963).

[13]Moreover, without some compelling showing of legislative intent, absent here, we cannot read the Tort Claims Act as exposing the government to liability, depending on the vagaries of state law, on a theory that the government has an obligation to control the off-duty

4. Petitioners' claims are, in any event, barred by 28 U.S.C. 2680(a), which bars tort claims against the United States based on the exercise of or failure to exercise a discretionary function. Petitioners' assertion, in essence, is that commanding officers at Hill Air Force Base should have taken the two airmen into custody or confined them to the base because the officers knew or had reason to know that they were dangerous or had psychological problems—and, in Pierre's case, that he allegedly was the prime suspect in connection with a murder in Ogden and was named in three criminal complaints charging him with auto theft.

This Court has long recognized the broad prosecutorial discretion vested in officers of the government responsible for enforcing the criminal laws. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868). Accordingly, the courts have consistently held that the exercise of prosecutorial discretion in declining to bring criminal charges against an individual or to warn the public of his potential for committing criminal acts is a discretionary function within the meaning of 28 U.S.C. 2680(a), depending, as it does, on difficult questions of fact, judgment, enforcement policy, and respect for the rights of the suspect or accused. See, *e.g.*, *Redmond* v. *United States*, 518 F. 2d 811, 816-817 (7th Cir. 1975); *Smith* v. *United States*, 375 F. 2d 243, 246-248 (5th Cir.), cert. denied, 389 U.S. 841 (1967); *United States* v. *Faneca*, 332 F. 2d 872 (5th Cir.

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conduct of its military personnel. Such a claim goes to the core of the government's relationship with its military personnel as regards screening, testing, command, and leave policies and the myriad practical difficulties involved in supervising off-base conduct of personnel stationed throughout the country. See *Feres* v. *United States*, 340 U.S. 135, 141-144 (1950); *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671-672 (1977).

1964), cert. denied, 380 U.S. 971 (1965); *Blessing* v. *United States*, 447 F. Supp. 1160, 1179 n.28 (E.D. Pa. 1978); *Brooks* v. *United States*, 152 F. Supp. 535 (S.D.N.Y. 1957); cf. *Dillon* v. *Antler Land Co.*, 341 F. Supp. 734, 743 (D. Mont. 1972), aff'd, 507 F. 2d 940 (9th Cir. 1974), cert. denied, 421 U.S. 992 (1975). In the present case, the decision by Air Force officers not to take Pierre into custody or confine him to the base in aid of state authorities' investigation of a murder in Ogden or criminal complaints charging Pierre with auto theft are similarly within the scope of the discretionary function exception.[14]

The decision whether the government should commit a person to an institution because of his alleged psychological problems or dangerous propensities is likewise a sensitive one, calling for the exercise of judgment, predictions about the person's future conduct, protection of the public, and appropriate respect for the individual's rights to remain free of restraint and of the stigma attaching to the mere fact of commitment for these reasons. *Vitek* v. *Jones*, No. 78-1155 (Mar. 25, 1980), slip op. 10-12; *Parham* v. *J. R.*, 442 U.S. 584, 600-601, 605-609 (1979); *Addington* v. *Texas*, 441 U.S. 418, 425-427 (1979); cf. *Martinez* v. *California*, No. 78-1268 (Jan. 15, 1980). The discretion of responsible government officials in determining whether to proceed with commitment in the interests of the individual or protection of society is

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[14]See also *Turner* v. *United States*, 248 U.S. 354, 357-358 (1919):

> The claimant contends that, by the general law, the Creek Nation is liable in damages for the action of the mob which resulted in the destruction of his property * * *.
>
> * * * The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace.

therefore akin to the exercise of prosecutorial discretion in the criminal context, and for similar reasons falls within the discretionary function exception in 28 U.S.C. 2680(a). See *Fahey* v. *United States*, 153 F. Supp. 878 (S.D.N.Y. 1957). Petitioners' claims alleging that the appropriate officials at Hill Air Force Base were negligent in not taking Pierre and Andrews into custody because of pending criminal investigations or for purposes of psychiatric evaluation and care are therefore barred for these reasons as well.

Finally, quite aside from the discretion necessarily vested in government officers with respect to law enforcement and commitment of individuals for observation and care, execution of the government's policy with respect to granting leave to its military personnel also involves a discretionary function within the meaning of 28 U.S.C. 2680(a). See note 13, *supra*.

5. We are aware of no court of appeals decision that the government may be held liable in negligence for its failure to commit or confine employees who other government employees are alleged to have had reason to believe might be dangerous. The decision below rejecting petitioners' novel theory of liability therefore does not create a conflict with any other decisions[15] and does not warrant review by this Court.

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[15]Petitioners' assertion of a conflict among the circuits is based on the Third Circuit's decision in *Gibson* v. *United States*, *supra*, and the Fifth Circuit's decisions in *Underwood* v. *United States*, *supra*, and *Fair* v. *United States*, *supra*. In all of these cases, however, the government had affirmatively assumed some manner of custody of the assailant going beyond a bare employer-employee relationship: in *Gibson*, by accepting the assailant as an enrollee at a Job Corps Center knowing that the enrollee might pose a threat; in the latter cases by committing the assailants to hospitals for examination because of threats they had made. These cases thus present no conflict with the instant case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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